BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DIANA S. WOODS	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 176,253 & 176,254
AIR TECHNOLOGIES, INC.	)	
Respondent	)	
AND	)	
	)	
TRAVELERS INSURANCE COMPANY and	)	
GULF INSURANCE COMPANY	)	
Insurance Carriers	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

On January 20, 1998, the application of the Workers Compensation Fund (hereinafter Fund) for review by the Workers Compensation Appeals Board of an Award issued by Administrative Law Judge Julie A. N. Sample on August 7, 1997, and Orders Nunc Pro Tunc issued on August 15 and August 27, 1997, came on for oral argument in Kansas City, Kansas.

APPEARANCES

Claimant appeared not having resolved all issues with the respondent by way of a settlement hearing held March 12, 1996. Respondent and its insurance carrier, Gulf Insurance Company, appeared by and through their attorney, Daniel N. Allmayer of Kansas City, Missouri. Respondent and its insurance carrier, Travelers Insurance Company, appeared by and through their attorney, D. Scott Brown appearing for Joseph R. Ebbert of Kansas City, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Terri Z. Austenfeld of Overland Park, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge and clarified in the Orders Nunc Pro Tunc of the Administrative Law Judge are herein adopted by the Appeals Board. However, the Appeals Board acknowledges a dispute regarding the medical reports of Dr. Edward J. Prostic, Dr. P. Brent Koprivica, and Dr. David A. Tillema attached to the transcript for settlement hearing of March 12, 1996. The Appeals Board acknowledges a further dispute regarding respondent's Exhibit 4 to the deposition of Kenneth Wertzberger, M.D., taken June 7, 1996, and dealing with the medical records of Dr. P. Brent Koprivica, Dr. Lance A. Reynoso, Larry J. Matney, D.C., Ray N. Conley, D.C., and additional medical reports from Ransom Memorial Hospital and Professional Plaza Laboratory of Ottawa, Kansas.

ISSUES

At oral argument, the parties stipulated that no controversy remained regarding the Administrative Law Judge's Award in Docket No. 176,253. Therefore, the Appeals Board affirms the Award for the injury of December 3, 1990.

(1) What, if any, is the liability of the Kansas Workers Compensation Fund in Docket No. 176,254?

(2) Whether certain medical reports attached to the settlement hearing of March 12, 1996, and medical reports marked as Exhibit 4 to the June 7, 1996, Kenneth Wertzberger, M.D., deposition are admissible or if the inclusion of these medical reports in the record violates K.S.A. 44-519.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant suffered two accidental injuries in this double docketed case. In Docket No. 176,253 claimant suffered accidental injury on December 3, 1990, when the door of the truck that claimant was helping unload struck her in the right leg twice knocking claimant from the truck. Claimant fell backwards striking the ground with her left shoulder. At that time, claimant was provided medical treatment and x-rays were taken of the right leg, which were found to be normal. Claimant returned to work with respondent at her regular job and continued working for respondent, although with increasing symptomatology through February 17, 1991, at which time she was taken off work. Claimant remained off work until May 13, 1991, at which time she returned to work in a utility position which claimant described as a modified job, lighter than the job she was

doing at the time of the December 1990 accident. Claimant was initially treated by Dr. Koprivica for this injury. The doctor's initial concern dealt with claimant's leg, which did improve. However, claimant's shoulder and ribs continued to hurt. In February 1991, it was discovered that claimant had suffered a fracture to the seventh rib on the left side as a result of the fall. Claimant was taken off work and remained off work while undergoing treatment for her rib and shoulder until her return to work in May 1991.

Claimant's shoulder felt better when she returned to work in May. However, after being on the job approximately two months, claimant began noticing increased symptomatology in the shoulder area. Claimant's shoulder symptoms continued to worsen and she reported this to her supervisors. In May 1992, a new general manager was hired by respondent and claimant reported her ongoing symptomatology to the new general manager, at that time. Claimant continued working for respondent in this lighter capacity job which did require claimant to lift up to 70 pounds occasionally, but which was not as strenuous as the job being performed by claimant in December 1990. This was claimant's uncontradicted opinion, as no representative of respondent testified.

On August 16, 1992, an accident report was prepared by respondent and claimant was referred for medical treatment to Dr. Kenneth Wertzberger in Lawrence, Kansas. At that time, most of claimant's pain was centered in the left scapular area. Claimant suffered catching and popping of the scapula with additional popping over the rib cage when she moved her shoulder. There was an indication of borderline carpal tunnel syndrome but Dr. Wertzberger did not believe these symptoms were connected to this injury. After a period of conservative treatment, Dr. Wertzberger recommended, and claimant agreed to, surgery on her left shoulder. This February 25, 1993, surgery involved a diagnostic arthroscopy, shaving of the anterior glenoid rim, and subscapular bursoscopy with shaving of the adhesions underneath the scapula. Claimant ultimately returned to a lighter duty sewing job with respondent but was only able to perform this job through September 1993, at which time she terminated her employment due to her ongoing problems. Claimant and respondent settled all issues in both cases by settlement hearing on March 12, 1996. The liability of the Kansas Workers Compensation Fund was reserved for future determination.

The Appeals Board will first consider whether the medical records of Drs. Prostic, Tillema, and Koprivica attached to the settlement hearing transcript and the medical records contained in respondent's Exhibit 4 to the Kenneth Wertzberger, M.D., deposition can be considered or whether the inclusion of these records is in violation of K.S.A. 44-519.

K.S.A. 44-519 states:

> "No report of any examination of any employee by a health care provider, as provided for in the workers compensation act and no certificate issued or given by the health care provider making such examination, shall be competent evidence in any proceeding for the determining or collection of

> compensation unless supported by the testimony of such health care provider, if this testimony is admissible, and shall not be competent evidence in any case where testimony of such health care provider is not admissible."

At the regular hearing, the Administrative Law Judge admitted the preliminary hearing transcript in its entirety with the exception of the medical reports attached. The Administrative Law Judge stated that these medical records would be admitted only if stipulated to by the parties. Absent a stipulation, these medical records would be excluded. In addition, certain medical reports were attached to the Hearing for Settlement of March 12, 1996. The submission letters of the Fund attorney and respondent's attorney representing Gulf Insurance Company agreed that the untestified to medical records were stipulated to and could be placed into evidence. The submission letter of the attorney representing the respondent and Travelers Insurance Company, however, asserted an objection to the inclusion of those medical records citing K.S.A. 44-519 as the basis for the objection.

During the deposition of Dr. Wertzberger, the attorney representing the respondent and Gulf Insurance Company attempted to place into evidence respondent's Exhibit 4 which included the before mentioned medical records. At that time, the attorney for the Workers Compensation Fund objected, citing K.S.A. 44-519 as the basis for her objection. In the submission letter of the Fund attorney, the objection to these records was withdrawn and the Fund attorney acknowledged these records could be considered as part of the record. However, the attorney representing the respondent and Travelers Insurance Company asserted the objection in his reply brief to the Assistant Director, citing K.S.A. 44-519 as the basis for the objection.

The Kansas Supreme Court in Roberts v. The J.C. Penney Company, No. 76,313 (Kan. opinion filed December 12, 1997) was asked to construe K.S.A. 44-519. In Roberts, a vocational rehabilitation expert provided a report regarding his opinion of a claimant's work disability, relying upon the report of a medical health care provider which report was not admitted into evidence. A timely objection was made and the Court was asked to decide whether the opinion of the vocational expert could be considered when it was based upon a medical report not in evidence. The Court of Appeals in Roberts, which had reversed the Workers Compensation Board, relied upon Boeing Military Airplane Co. v. Enloe, 13 Kan. 128, 130, 764 P.2d 462 (1988), *rev. denied* 244 Kan. 736 (1989) and on McKinney v. General Motors Corp., 22 Kan. App. 2d 768, 921 P.2d 257 (1996) to hold:

> "*Boeing* and *McKinney* provide three important rules of law applicable to the present case: (1) Medical testimony is not required to establish a claimant's work disability rating; (2) neither the ALJ nor the Board is bound by technical rules of evidence; and (3) **K.S.A. 44-519 applies only when *a party* introduces a medical report of a nontestifying physician as evidence.** Here, the ALJ correctly ruled that a vocational expert could rely

> on the medical reports of nontestifying physicians which had not been introduced as evidence in the proceeding." 23 Kan. App. 2d at 793. (Emphasis added.)

The Supreme Court in reversing the Court of Appeals found that "[t]he ruling of an administrative agency on questions of law, while not as conclusive as its findings of fact, is nonetheless persuasive and may carry with it a strong presumption of correctness." Roberts, *supra*.

The Supreme Court stated, quoting Boeing, *supra* that:

> "K.S.A. 44-519 does not limit the information a testifying physician or surgeon may consider in rendering his or her opinion as to the condition of an injured employee." Syl. ¶ 2.
>
> "K.S.A. 44-519 does not prevent a testifying physician from considering medical evidence generated by other absent physicians as long as the testifying physician is expressing his or her own opinion rather than the opinion of the absent physician". Syl. ¶ 3.

The rationale for this holding was that doctors commonly rely on reports furnished by other doctors in arriving at their diagnoses. To require each and every doctor who provided any type of report in a case to testify would "set a standard more stringent than the one which governs admissibility of expert opinions in civil trials." Boeing, *supra* at 131.

The Supreme Court felt it significant that "K.S.A. 44-519 does not prevent a testifying physician from considering medical evidence generated by other absent physicians **as long as** the testifying physician is expressing **his or her own opinion** rather than the opinion of the absent physician." (Emphasis added.) In Roberts, the Court felt that the opinion expressed by the vocational rehabilitation expert would not be admissible when based upon medical evidence not in the record because vocational experts do not have the medical expertise to assess the soundness of the medical opinions and the reports of the health care providers. The Court in Roberts rejected the opinion of the vocational expert as it was based upon a medical report not placed into evidence. The Court further found that the workers compensation system had been well served by requiring the opinions of experts to be based upon testimony subject to cross-examination, and if this was to be changed, the legislature should do so and not the court. In considering both Roberts and Boeing, *supra*, the Appeals Board adopts the Court's conclusion that the workers compensation system has been well-served by requiring opinions of experts to be based upon testimony subject to "cross-examination."

In this instance, there is a significant dispute regarding the admissibility of these numerous medical reports. The objection of the Fund, though timely, was withdrawn. The objection of the attorney representing respondent and Travelers Insurance Company,

though not timely, was not withdrawn and was asserted in its briefs to both the Assistant Director and the Appeals Board. The Appeals Board finds that the medical reports attached to the settlement hearing of March 12, 1996, and the medical reports contained in respondent's Exhibit 4 to the Kenneth Wertzberger, M.D., deposition of June 7, 1996, are in violation of K.S.A. 44-519 as they were not stipulated into evidence by the parties and the testimony of the health care providers was not taken to support the reports. Therefore, these medical reports will be excluded from the record.

The Appeals Board must next consider the liability of the Kansas Workers Compensation Fund. The record includes the testimony of claimant taken on three separate occasions: the preliminary hearing of December 22, 1993; the regular hearing of January 24, 1996; the settlement hearing of March 12, 1996; and the deposition of Dr. Kenneth Wertzberger. Claimant described in detail a substantial injury suffered on December 3, 1990, when she was knocked from the back of a truck landing on her left shoulder. Claimant further describes a substantial period of recuperation which required that she be off work from February 17, 1991, through May 13, 1991. When she returned to work she was placed in a utility position which claimant described as being a modified job and lighter work than she was doing at the time of the December 1990 accident. Claimant worked for respondent at this lighter job for approximately two months and then began developing additional problems. By August 1992, claimant could no longer perform her job duties and was forced to leave work and seek medical treatment. Respondent was aware of claimant's initial injury having provided both medical treatment and temporary total disability benefits after the 1990 fall. Claimant's testimony describing her ongoing symptomatology, worsening of conditions, and multiple conversations with respondent is uncontradicted. "Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless shown to be untrustworthy . . . ." Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146(1976).

K.S.A. 1992 Supp. 44-567(a)(1) states in part:

> "Whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the director awards compensation therefor and finds the injury, disability or the death resulting therefrom probably or most likely would not have occurred but for the preexisting physical or mental impairment of the handicapped employee, all compensation and benefits payable because of the injury, disability or death shall be paid from the workers' compensation fund."

Liability will be assessed against the Workers Compensation Fund when an employer shows that it knowingly hired or retained a handicapped employee who subsequently suffered a compensable work-related injury. An employee is handicapped under the act if the employee is afflicted with an impairment of such character as to constitute a handicap in obtaining or retaining employment. Carter v. Kansas Gas & Electric Co., 5 Kan. App. 2d 602, 621 P.2d 448 (1980).

The determination as to whether a handicap exists and whether the employer has knowledge of it is a question of fact that must be made on a case-by-case basis. Ramirez v. Rockwell Int'l, 10 Kan. App. 2d 403, 701 P.2d 336, (1985).

The employer has the burden of proving it knowingly hired or retained a handicapped employee. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

The testimony of claimant and the medical opinion of Dr. Wertzberger are uncontradicted. Claimant acknowledges suffering a substantial injury in December 1990, missing nearly three months of work, and returning to work with respondent at an accommodated lighter duty position. Claimant further describes multiple conversations with respondent regarding her ongoing difficulties and increased symptomatology. This increased symptomatology ultimately led to claimant's leaving her employment with respondent and undergoing surgery by Kenneth Wertzberger, M.D.

In Dr. Wertzberger's deposition a lengthy question was presented describing the history and circumstances leading up to claimant's injuries. Dr. Wertzberger was ultimately asked whether he had an opinion within a reasonable degree of medical probability that "but for" that previous condition she would not have developed the problems which she developed during her return to work from the May 1991 to September 1992 time period. Dr. Wertzberger's answer, while slightly unorthodox, does state:

> "The only way I can do this because I haven't seen the patient at that time was just to look back in the records and in those records it appears to me to be a significant enough injury that I would postulate to a reasonable degree of certainty that it probably was related for the but-for clause."

Dr. Wertzberger went on to state "[i]t seems to be the same kind of thing that she was complaining of later. Not necessarily the slipping but the pain in the same area."

The Appeals Board, in deciding nearly 3,000 workers compensation cases since its inception in October 1993, has had the opportunity to review many medical reports and read the testimony of many health care providers. Dr. Wertzberger's name is certainly known to the Appeals Board as he has been utilized in numerous cases as both a treating physician and a testifying expert. The "but for" question is well-known to both litigators and members of the health care profession actively involved in workers compensation litigation. Dr. Wertzberger has had the opportunity on many occasions to answer this question and the Appeals Board finds his answer, while unorthodox, is sufficient to support a finding that "but for" claimant's preexisting handicap she would not have suffered the injuries during the period May 1991 through August 1992. Therefore, the Appeals Board finds that the Award by the Administrative Law Judge assessing 100 percent of the liability for this injury to the Workers Compensation Fund is appropriate and should be affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Julie A. N. Sample dated August 7, 1997, and the Orders Nunc Pro Tunc of August 15, 1997, and August 27, 1997, should be, and hereby are, affirmed in all respects and the respondent and its insurance carrier, Gulf Insurance Company, are denied any recovery from the Fund for any sums paid under Docket No. 176,253 per the stipulation of the parties at oral argument; and further, for the reasons set forth above, that the respondent and its insurance carriers, Travelers Insurance Company and Gulf Insurance Company, are entitled to 100% reimbursement from the Fund for any and all amounts paid under Docket No. 176,254.

The fees necessary to defray the expense of the administration of the Workers Compensation Act shall be assessed against the Workers Compensation Fund to be paid as follows:

Curtis, Schloetzer, Hedberg, Foster & Associates	$394.90
Richard Kupper & Associates	388.50
Nora Lyon & Associates	441.33

IT IS SO ORDERED.

Dated this ____ day of January 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph R. Ebbert, Kansas City, KS
Daniel N. Allmayer, Kansas City, MO
Terri Z. Austenfeld, Overland Park, KS
Julie A. N. Sample, Administrative Law Judge
Philip S. Harness, Director